

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

WHIDBEY ENVIRONMENTAL ACTION
NETWORK (WEAN),

Petitioner,

v.

ISLAND COUNTY,

Respondent.

Case No. 14-2-0009

**ORDER DENYING MOTION FOR
RECONSIDERATION**

WEAN's challenge has been directed at Island County's update of its comprehensive plan and development regulations for fish and wildlife habitat conservation areas (FWHCAs). The Board found areas of non-compliance in its Final Decision and Order of June 24, 2015. Thereafter, in the Compliance Order of September 29, 2016, it concluded the County had achieved compliance in some regards but remanded others to the County. The matter is again before the Board on WEAN's Motion for Reconsideration, filed October 10, 2016, addressing parts of the September 29, 2016 Compliance Order. Island County filed a response to the reconsideration motion on October 20, 2016.

A motion for reconsideration of a final decision of the Board is governed by WAC 242-03-830. WAC 242-03-830(2) provides that a motion for reconsideration shall be based on at least one of the following grounds:

- (a) Errors of procedure or misinterpretation of fact or law, material to the party seeking reconsideration; or
- (b) Irregularity in the hearing before the board by which such party was prevented from having a fair hearing.

WEAN requests that the Board reconsider its Compliance Order in two respects, arguing both misinterpretations of fact and law.

- 1 1. It states the Board erred in allowing the Island County Board of County
2 Commissioners to appear before the Board and failing to disallow one of the
3 attorneys from appearing before the Board;
- 4 2. It also argues the Board erred in finding the County was in compliance in regards to
5 the designation and protection of a specific type of fish and wildlife critical area:
6 prairies.
7

8 I. DISCUSSION

9 A. Appearance by Counsel

10 In its Order Finding Compliance and Continuing Non-Compliance the Board denied
11 WEAN's continuing objection to the appearance of Susan E. Drummond on behalf of the
12 County. It asks the Board to strike all pleadings signed by Susan E. Drummond as well as
13 her oral argument.
14

15 The first Notice of Appearance filed in this case was filed by "Gregory M. Bank, Island
16 County Prosecuting Attorney by Adam R. Long, Deputy Prosecuting Attorney" on behalf of
17 Island County. Drummond filed a Notice of Appearance on August 11, 2016 which stated
18 she was appearing on "behalf of the Board of Island County Commissioners". Thereafter,
19 and in response to WEAN's objections, Drummond filed an Amended Notice of Appearance
20 on August 22, 2016. In that Notice she stated that both she and Mr. Long represented
21 Island County and that all pleadings filed to that point were filed on Island County's behalf.
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23 WEAN's argument regarding the lack of "standing" of the Board of County
24 Commissioners is not well taken. The Board notes that Island County's pleadings were filed
25 and cosigned by both Long and Drummond. Both appeared at the Compliance Hearing held
26 in Coupeville, Washington. It is clear to the Board that at all times Island County was
27 represented by both the Island County Prosecuting Attorney's office through Mr. Long as
28 well as by Ms. Drummond. Whether or not she filed an appearance(s) stating she
29 represented the Board of Island County Commissioners or Island County is not dispositive.
30 It is clear to the Board that both Long and Drummond advocated in support of the legislation
31 Island County adopted to address the areas of GMA non-compliance.
32

1 WEAN has failed to establish any misinterpretation of fact or law and, most
2 significantly, it has failed to establish that any such misinterpretation, if it did exist, was
3 material to WEAN, the party seeking reconsideration, as required by WAC 242-03-
4 830(2)(a). WEAN's request to reconsider and strike pleadings and argument will be denied.
5

6 **B. Designation of Prairies**

7 WEAN alleges the Board misinterpreted the facts by failing to recognize the County
8 did not designate all prairies as Fish and Wildlife Habitat Conservation Areas. It also
9 contends that the Board misinterpreted the law as the failure to designate all prairies will
10 result in a net loss of habitat in violation of the duty to protect all critical areas.
11

12 WEAN states there are "sites ('habitats') meeting the Westside Prairie [WDFW]
13 definitional criteria" that were not designated.¹ It then states that all of the prairie sites, both
14 designated and not designated, comprise the prairie ecosystem and a failure to designate
15 all prairies will lead to a net loss of prairie ecosystem functions and values.² WEAN argues
16 that the Board misinterpreted the facts due to its failure to recognize that the County did not
17 designate all prairies. It also contends that the Board misinterpreted the law in that the
18 failure to designate all known remnant prairies will allow a net loss of prairie habitat.
19

20 WEAN's argument at the May 21, 2015 Hearing on the Merits was that the County
21 had failed to designate prairies at all. The Board agreed with WEAN and in its Final Decision
22 and Order found non-compliance with RCW 36.70A.060 and RCW 36.70A.172 based on
23 the County's failure to designate any of the County's Westside Prairies as fish and wildlife
24 habitat conservation areas of local importance.³ The Board noted WAC 365-190-130(2)(b)
25 directs jurisdictions to consider habitats and species of local importance for classification
26 and designation.⁴ Then, on compliance, after the County designated 12 sites as FWHCAs of
27 local importance, WEAN argued that designating prairies merely as locally important was
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31 ¹ WEAN's Motion for Reconsideration at 13.

32 ² *Id.* at 14.

³ In the Board's FDO it stated the County "... failed to include BAS through its decision to not designate and protect Westside Prairies...".

⁴ Final Decision and Order at 37.

1 insufficient. Now, on reconsideration it raises a different argument: that the County did not
2 designate all prairie remnants.

3 As stated, the County's compliance legislation designated 12 "prairie" areas as fish
4 and wildlife habitat conservation areas of local importance, five more than earlier BAS
5 analysis had disclosed. The BAS indicates the County designated "all known Island County
6 prairies . . . ", although it acknowledged that some remnant prairies may have been
7 omitted.⁵ (The Board was well aware of that statement from the BAS and was not mistaken
8 as to that fact.)
9

10 Peer review of The Watershed Company's BAS analysis compared Island County's
11 approach to that of Thurston County.⁶ It observed that the Island County approach was
12 "more proactive" as it protects prairies, [as well as herbaceous balds, and Oak Woodlands]
13 "by identifying and designating all of these habitats, even if they are currently degraded".
14 The County's designation of those areas is by general location and the County "can use the
15 results of The Watershed Company memo [Exhibit 38 attached to Island County's
16 Compliance Report] to direct conservation and restoration resources to sites most likely to
17 persist and provide habitat for more native species over time".⁷ A fact which WEAN fails to
18 acknowledge is that County regulations require a biological site assessment whenever a
19 development proposal is located within 1000 feet of a critical area, including FWHCAs.⁸
20 WEAN also fails to acknowledge that the BAS in the record discloses that some small areas
21 of remnant prairie are likely to support only limited habitat functions.⁹ As Island County
22 found in its compliance legislation: "Also, habitats and species of local importance must
23 represent either high-quality native habitat or habitat that has a high potential to recover to a
24 suitable condition. These characteristics have also not been identified as being present."¹⁰
25 Attached to Ordinance C-71-16 was a Staff Summary and Response to Comments Matrix:
26
27
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29
30 ⁵ Exhibit 11: The list of protected habitats may omit some small areas or remnant Prairie, but due to their size,
such small remnant prairies are likely to support limited habitat functions.

31 ⁶ Exhibit 5 attached to Island County's Compliance Report, Krippner Consulting, LLC, at 1.

32 ⁷ *Id.*

⁸ ICC 17.02B. 410 (A).

⁹ Exhibit 11 attached to Island County's Compliance Report at 2.

¹⁰ Ordinance C-71-16, at page 11, Finding 5.10, pages 11, 12.

1 (The following was a response to WEAN's comment suggesting that all areas meeting
2 WDFW's Priority Habitat and Species criteria be designated.) "The County could have
3 allowed for these areas to be identified on a more ad-hoc basis. However, the County
4 elected to take a more proactive approach, and retained professional consultants to identify
5 qualifying Prairie, Oak Woodlands, and Herbaceous Balds areas up front. This approach
6 ensures the protection of these habitat areas. The more ad-hoc approach suggested would
7 be difficult to administer, and is likely less protective."¹¹

8
9 The County's action is presumed valid and it is incumbent upon WEAN to meet its
10 burden of proof to establish the compliance legislation is clearly erroneous in view of the
11 entire record before the Board.¹² Merely alleging that the failure to designate all prairie
12 remnants "will result in a net loss of this ecosystem"¹³ is insufficient to meet that burden.
13 WEAN's citation to Board decisions to the effect that " . . . all critical areas must be
14 designated . . ." without acknowledging other statements from the same decision setting
15 forth various allowed critical area regulation exemptions is disingenuous.¹⁴
16

17 WEAN has failed to establish any misinterpretation of fact or law to support its motion
18 for reconsideration regarding the designation of prairies. Its motion for reconsideration of the
19 Board's order regarding designation of prairies will be denied.
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21 II. ORDER

22 Based on the foregoing, WEAN's Motion for Reconsideration is Denied.
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24 Entered this 28th day of October, 2016.
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26
27 _____
William Roehl, Board Member
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30 _____
31 ¹¹ Exhibit B, Staff Summary and Response to Comments Matrix attached to Island County's Compliance
Report which was tabbed as Exhibit 1 (Ordinance C-71-16), dated June, 2016 at 6.

32 ¹² RCW 36.70A.320.

¹³ WEAN's Motion for Reconsideration at 14.

¹⁴ See Case No 95-2-0071, *Whatcom Environmental Council v. Whatcom County*, (FDO December 20, 1995),
at 5, 6.

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Nina Carter, Board Member

Raymond Paoletta, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.¹⁵

¹⁵ A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.